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NO. 401

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM M. BUTLER, et al., Receivers of
HOOSAC MILLS CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF VERNON A. VROOMAN, COUNSEL FOR THE LEAGUE FOR ECONOMIC EQUALITY, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST DISTRICT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned, as counsel for The League for Economic Equality, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

VERNON A. VROOMAN,
Counsel for the League for Economic Equality, as *Amicus Curiae.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST DISTRICT

BRIEF OF VERNON A. VROOMAN AS AMICUS CURIAE

PRELIMINARY STATEMENT

In this brief it is contended that sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 46 Stat. 31, providing for processing and floor-stocks taxes, are constitutional.

The undersigned offers this brief as counsel for the League for Economic Equality, an organization supported by farmers and friends of farmers in four of the Corn-Belt States—Iowa, Minnesota, Nebraska and South Dakota. The matters involved in the case at bar are of vital concern

to the farmers of those states. No less in the Corn Belt than in the Cotton Belt are farmers interested in the establishment and maintenance of a balance between the supply of, and the effective demand for, the products of agriculture, and in securing and preserving economic equality between agriculture and other industries, with parity between the prices of agricultural and the prices of nonagricultural products. Wherefore it is the desire of the League that a brief by its counsel be filed in this case, to assist the Court in reaching a decision herein.

This brief is drawn upon the theory that any legal rule or principle bearing upon the question of the constitutionality of the tax measures involved in this case, whether or not such rule or principle was stated to or considered by the lower courts when this case was before them, may be stated to this Court. The question of the constitutionality of a law is a matter of such public concern that the Court, it would seem, should always be a third party to any litigation involving such a question, even when a State or the United States is formally a party to the litigation, and in coming to a decision of the question the Court should not be isolated from any rule or principle because such rule or principle was not mentioned in the case when the case was in the lower courts. It would seem that the limits of consideration of so important a queston should not be fixed, in this Court, by the number and scope of the legal rules and principles addressed to the question before it reached this tribunal.

This brief is drawn by one who believes that, as far as constitutional law is concerned, only moderate reliance should be placed on judicial precedents, and that the Constitution itself should, at any given time, be matched against the problems of that time, with a view to ascertaining

whether it is not susceptible of a reasonable interpretation rendering it equal to those problems. "One other duty," says Warren (The Supreme Court in United States History, Vol. 2 of the 1926 ed., p. 748), "towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely to insist that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. * * *"

No less in the realm of constitutional law than in that of politics or that of economics must realism prevail, and the Constitution must be put to the test of pragmatism in every day and age of the life of our country. We must realize that the words of our Constitution "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Missouri v. Holland, 252 U. S. 416, 433.
And see *Home Building & Loan Assn. v. Blaisdell*; 290 U. S. 398, 442-3.

He who seeks interpretation of the Constitution predicates his case upon it. He who predicates his case upon the Constitution seeks to uphold the Constitution. To advocate one interpretation of the Constitution and challenge another interpretation thereof is not to challenge the Constitution itself.

SUMMARY OF ARGUMENT

The argument involves two main general propositions concerning the processing and floor-stocks taxes provided for by sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31.

I. Sections 9 and 16 of the Agricultural Adjustment Act, judged by the purposes of the Act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

II. Sections 9 and 16 of the Agricultural Adjustment Act contravene none of the limitations which the Constitution places upon congressional action.

Under the first main general proposition it is contended: A. The supreme object of the Constitution as a whole is the general welfare of the people of the United States. B. The processing and floor-stocks taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution. C. The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power. D. In connection with the force and effect of the general-welfare purpose stated in the Preamble to the Constitution, and the general-welfare provision of Clause 1 of Section 8 of Article I of the Constitution, the last clause of the said section 8, relative to making all laws that shall be necessary and proper, etc., should be considered.

Under the second main general proposition it is contended: A. Neither the processing taxes nor the floor-stocks taxes are within the prohibition of Section 9 of Article I of the Constitution, that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumera-

tion which in the Constitution is directed to be taken. B. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States. C. These excises do not contravene the Fifth Amendment. D. They do not contravene the Tenth Amendment. E. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

We now go into a more detailed summary of each of the main general propositions.

I. Sections 9 and 16 of the Agricultural Adjustment Act, judged by the purposes of the Act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

A. The supreme object of the Constitution as a whole is the general welfare of the people of the United States.

To promote the general welfare, in some way, should be the object of every political act, and the promotion of the general welfare is the most general purpose stated in the Preamble to the Constitution. That purpose includes all the other purposes stated in the Preamble, and indicates that in other ways than those stated therein the general welfare may be promoted. General welfare is the primary object of all positive law.

Legislative acts differ in degree only, in point of serving the general welfare. See *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413.

The common good is the good of all.

"General welfare," "public welfare," "common welfare" mean the same. *Stockton v. Williams* (Mich.), 1 Doug. 546, 570; *Kirkendall v. Omaha,* 39 Neb. 1, 57 N. W. 752, 754; *Spokane Traction Co. v. Granath,* 42 Wash. 506,

85 Pac. 261, 264; *Aymette v. State,* 2 Humph. (21 Tenn.) 154, 158.

It embraces every matter which, with respect to any interest, whatever it may be (e. g., any social, political or economic interest), involves the welfare of all who constitute a given community (e. g., a city, a State, the United States), the term being of the broadest import with regard to the number and diversity of the matters and the number of individuals and classes it concerns and connoting the antithesis of special or private interest. *Standard Oil Co. v. City of Bowling Green,* 244 Ky. 362, 50 S. W. (2d) 960, 961; *State v. Hutchinson Ice Cream Co.,* 168 Iowa 1, 10, 147 N. W. 195, 199, L. R. A. 1917 B, 1918; *Miller v. Board of Public Works,* 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479; *Pettis v. Alpha Alpha Chapter,* 115 Neb. 525, 213 N. W. 835, 838; *Steele-Smith Dry Goods Co. v. Birmingham Ry. Light & Power Co.,* 14 Ala. App. 271, 73 So. 215, 216; *Platt v. Craig,* 66 Ohio 75, 63 N. E. 594, 595; *Chamberlain v. City of Burlington,* 19 Iowa 395, 403; *Cawker v. Meyer,* 147 Wis. 320, 133 N. W. 157, 37 L. R. A. N. S. 510.

The direct benefit of some may be the indirect benefit of others and thus in ultimate the benefit of all; legislation which confers direct benefit on some with a view to achieving the benefit of all has the general welfare for its object. *Village of Carthage v. Frederick,* 122 N. Y. 268, 25 N. E. 430, 481. And see *Chicago, Burlington & Quincy Ry. Co. v. People,* 200 U. S. 561, 593.

The more complex the economic life of the Nation, the greater the number of matters which become of national import and concern, in point of general welfare, and which pass beyond the possibility of effective State action. The Constitution could hardly have been intended to preclude national action in such matters.

B. The processing and floor-stocks taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution.

(1) The Preamble states the general purpose of the Constitution, "to promote the general welfare." Clause 1 of Section 8 of Article I of the Constitution empowers Congress to lay and collect taxes "to provide for * * * the general welfare."

Every part of the Constitution should be interpreted in the light of the general-welfare purpose expressed in the Preamble. See *Holmes v. Jennison,* 14 Pet. 540, bot. 570; Also *Commonwealth v. City of Newport News* (Va.), 164 S. E. 689, 696.

Congress may impose taxes to provide for *whatever* is within the scope of the national general welfare. Story, Commentaries on the Constitution, 5th ed., secs. 911-913. And see Burdick, The Law of the American Constitution, sec. 77.

In *United States v. Gettysburg Electric Ry.,* 160 U. S. 668, 680, the Court came very close to, if it did not actually arrive at, the point of regarding promotion of the general welfare as within a general power of Congress. See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 706.

(2) There is but little restriction upon the power of Congress to regulate, by means of taxation, the production, manufacture, sale and transportation of articles within the States. See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 738. Also Burdick, The Law of the American Constitution, sec. 78. Thus Congress may often achieve through taxation what it may not achieve otherwise. Cross-reference: Argument, II C (2). The power of taxation may validly become the power of destruction, and the

motive for destruction be beyond judicial inquiry. Cross-reference: Argument, II C (1). Thus Congress, by imposing a tax as distinguished from a penalty, may even go so far as to *destroy* one thing in order to *save* another.

(3) Processing and floor-stocks taxes bear analogies to protective tariffs. *Protective* duties are not imposed just to pay the debts of the United States or provide for the common defense, but are imposed to provide for the general welfare. See *Field v. Clark*, 143 U. S. 649, 696. Also *Child Labor Tax Case*, 259 U. S. 20, bot. 24.

The Constitution "has known protective tariffs for a hundred years." *Alaska Fisheries Co. v. Smith*, 255 U. S. 44, 48. In fact, they date from the second act of the First Congress, and therefore from a time when framers of the Constitution were actively participating in public affairs. *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 411-12. And see suggestion of counsel in *Hill v. Wallace*, 259, U. S. 44, 53. If the framers of the Constitution thought that imposts were for the general welfare, and constitutional, when laid to encourage and protect manufacturing, would they not have deemed excises to be for such welfare, and equally constitutional, if it had been felt necessary, and had been proposed, to lay them to provide means with which to encourage and protect agriculture?

(4) The Act does not preclude appropriation of the proceeds of these excises to other purposes. These taxes (see section 19 of the Act) go into the general fund of the Treasury. The existence of the economic emergency is recognized in various acts and in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, and these excises may be appropriated to finance any of these acts. See section 19 of the Act. And see section 14 thereof. Congress has not permitted the validity of these excises to depend upon whether

the agricultural features of the Act are constitutional, nor has Congress foreclosed itself from appropriating to any permissible purposes the revenues which these excises produce. Congress may even devote these revenues to the discharge of moral obligations. *United States v. Realty Co.*, 163 U. S. 427, 437 *et seq.* We contend that the obligation of the agreements which the Secretary of Agriculture has made with millions of farmers is legal. The reliance of these farmers upon the validity of the agreements will have created a moral obligation on the part of the United States, in the event that such agreements are declared unconstitutional.

C. The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power.

(1) National police power under the tax clause, the commerce clause and the post-roads clause is broad, and overrides all State legislation except such as may be "construed as no interference with the authority of the National Government." See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 739. It is submitted that the national police power extends beyond the boundaries of the clauses just mentioned. Taxes laid and collected with the agricultural rental and benefit payments in mind are laid and collected in behalf of a welfare for the protection of which the police power of the Nation may be exerted.

The police power involves the sociological interpretation of our Constitution and law. Drake, The Sociological Interpretation of Law, 16 Michigan Law Review, 599, 614. And see 2 Warren, The Supreme Court in United States History (1926 ed.), P. 740. The object of the police power, like that of the Constitution, is general welfare. *Ibid.*, 744.

As to the Tenth Amendment: "We must consider what this country has become in deciding what that Amendment has reserved." *Missouri v. Holland*, 252 U. S. 416, 434. According to that Amendment, not only are powers reserved to the States but powers are reserved to the people of the United States. See *Kansas v. Colorado*, 206 U. S. 46, 90. The "people of the United States," a people existing under the Articles of Confederation, adopted the Constitution. *Scott v. Sanford*, 19 How. 393, 404; *Martin v. Hunter*, 1 Wheat. 304, 324; *Chisholm v. Georgia*, 2 Dall. 419, 470; *Barron v. Baltimore*, 7 Pet. 243, 247. The Ninth Amendment insures certain rights to that people. *Holmes v. Jennison*, 14 Pet. 540, 557. Among the powers and rights reserved and insured to the national people is the police power. It is a "reserved" power—a reserve element of sovereignty. 12 C. J., Const. Law, sec. 412; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 444; *Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 1103, 184 N. W. 823, 826-7. The police power of the States is police power in matters which do not affect the national people as a whole and do not lie beyond the scope of effective State action. 12 C. J., Constitutional Law, sec. 417, criticized, and the fear expressed in *Kansas v. Colorado*, 206 U. S. 46, 91, not entertained. The police power is impliedly a part of the Constitution, in the sense of a thing which is by necessity impliedly recognized by the Constitution, inasmuch as the police power and the power of making, changing and amending constitutions are parts of the sovereign power of the people, and inasmuch as general welfare is the ultimate object of all manifestations of sovereignty. Congress may exercise the police power of the Nation in a matter involving the entire citizenry of the Nation. 12 C. J., Const. Law, sec. 417, explained.

The exercise of the national police power seems particu-

larly called for in a matter that is national on so great a scale that State legislation in the matter, unless in aid of national legislation, would be practically futile. Nor can the States enact protective tariffs, enter into agreements or compacts with one another, make treaties with foreign nations, or regulate the value of money, in order to deal with the agricultural emergency." Constitution, Art. I, Sec. 10.

A law enacted to protect the public is not invalid if it has a real or substantial relation to public welfare, and is not a clearly arbitrary or oppressive act, or the result of passion, ignorance or folly. 2 Warren, The Supreme Court in United States History (1926 ed.), p. 745, and cases cited; Learned Hand, Due Process of Law and the Eight-Hour Day, 21 Harvard Law Rev. 495, 500.

(2) The Agricultural Adjustment Act embodies a conservation program, in effect forcing the resting of the soil from too frequent production of the same sort of crop, thus tending to conserve certain areas especially suited to the production of certain commodities, which areas (e. g., the corn belt and the cotton belt) are great national assets on which national prosperity greatly depends. Police-power legislation need not in terms refer to the police power. The facts on which the exercise of the power depends, with respect to the conservation of the areas above mentioned, may be judicially noticed. 23 C. J., Evidence, secs. 1810 and 1860.

The several States included in one of these areas can not enter into compacts with one another in order to conserve the soil of the area. Constitution, Art. I, Sec. 10, Cl. 3.

There are sufficient checks upon attempts to exercise the police power unduly. Measures invoking it must run the gamut of legislative enactment, presidential approval and judicial scrutiny. And must be reasonably necessary, also

reasonable in method. See *American Coal Mining Co. v. Special Coal and Food Commisison of Indiana,* 268 Fed. 563, 570 (appeal dismissed; 248 U. S. 632), and *Nebbia v. New York,* 291 U. S. 502, 525. In point of whether it calls for voluntary action or imposes coercive measures, the Agricultural Adjustment Act differs from the National Industrial Recovery Act, and the case at bar is correspondingly distinguishable from *Schechter v. United States,* 79 L. Ed. 888. The rights of a State are not invaded where the State has an option to act or not to act. *Massachusetts v. Mellon,* 262 U. S. 447, 480. The same would seem to be true of the rights of the individual.

At any rate, economic emergency justifies the Act, under the police power, as a short-time program at least, for reasons stated in the Act itself. See, therein, the Declaration of Emergency. Emergency is the occasion, though not the source, of the power. *Schechter v. United States,* 79 L. Ed. 888, 894, and cases there cited. The agricultural emergency may be judicially noticed. Matters of common knowledge, the contents of presidential proclamations, declarations of emergency in congressional acts, allusions to emergency in the Congressional Record, may all be judicially noticed. 23 C. J., Evidence, sec. 1810; sec. 1900; sec. 1934, f. n. 95 (a, 4); sec. 1947. It has been *held* that a court may judicially notice the existence of a public emergency. *Block v. Hirsch,* 256 U. S. 135, 154.

D. In connection with the force and effect of the general-welfare purpose stated in the Preamble, and the general-welfare provision of Clause 1 of Section 8 of Article I of the Constitution, the last clause of said Section 8, relative to making all laws that shall be necessary and proper, etc., should be considered.

The force and effect of the clause is to enlarge congres-

sional power. *McCulloch v. Maryland,* 4 Wheat. 316, 415; *Legal Tender Cases,* 12 Wall. 457, 531, 550; *Legal Tender Cases,* 110 U. S. 421, 440. If from the Preamble, the tax clause and the last clause of said Section 8, a power to act in behalf of the general welfare does not exist, to the extent necessary to render the Agricultural Adjustment Act constitutional, we are at a loss to account for the constitutionality of many things that have been held to be, else are habitually regarded as, constitutional. There is an analogy between the implied power of Congress to enact certain laws and the implied power of the Court to declare laws unconstitutional. Under the Constitution many things not mentioned therein may be provided for. Instance banks. The Louisiana Purchase and other like purchases are undoubtedly constitutional.

II. Sections 9 and 16 of the Agricultural Adjustment Act contravene none of the limitations which the Constitution places upon congressional action.

A. Neither the processing taxes nor the floor-stocks taxes are within the prohibition of Section 9 of Article I of the Constitution, that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration which in the Constitution is directed to be taken.

These taxes, being upon things done to or with commodities or the articles processed from them, are not direct taxes but excises. *Tyler v. United States,* 281 U. S. 497, 502; *Y. M. C. A. v. Davis,* 264 U. S. 47; *Edwards v. Slocum,* 264 U. S. 61; *Billings v. United States,* 232 U. S. 261, 279; *Stanton v Baltic Mining Co.,* 240 U. S. 103, 114; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *Thomas v. United States,* 192 U. S. 363; *Knowlton v. Moore,* 178 U. S. 41; *Murdock v. Ward,* 178 U. S. 139; *Nicol v. Ames,* 173 U. S. 509; *Scholey v. Row,* 23 Wall. 346; *Hylton v. United States,* 3 Dall. 171.

In *Stratton's Independence v. Howbert,* 231 U. S. 399, top of 415, the term "processing tax" was almost applied to a certain excise.

Subsection 16(a) does not impose floor-stocks taxes on stocks not held for sale or other disposition. Other disposition means something in the same class with sales. Rule of *ejusdem generis.* And see subsection 15 (b). Subsection 16(a) anticipates sales or other dispositions. Discontinuance of a processing tax involves a rebate of moneys paid under the corresponding tax on floor stocks, the rebate being on the basis of so much of such stocks as remain unsold or otherwise undisposed of when such processing tax is discontinued. And subsection 16 (a) *in terms* imposes the floor-stocks taxes on sales and other dispositions of certain processed articles. *Patton v. Brady,* 184 U. S. 608, is in point.

If he who pays a tax may shift the burden thereof to another, the tax is an excise. *Pollock v. Farmers Loan & Trust Co.,* 157 U. S. 429, 558. And see Cooley, Taxation (3d ed.), p. 10. Also 61 C. J., Taxation, sec. 6, f. n. 57.

Even a tax imposed directly upon ownership or a thing owned is treated as an excise if laid to prevent the evasion of an excise. *Tyler v. United States,* 281 U. S. 497, 505 (citg. *Taft v. Bowers,* 278 U. S. 470, 482); *District of Columbia v. Brooke,* 214 U. S. 138, 150; *Milliken v. United States,* 283 U. S. 15, 23.

B. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States.

The Constitution requires geographical uniformity, only, in the imposition of excises. *LaBelle Iron Works v. United States,* 256 U. S. 377, 392. And on the processing of a hundred pounds of hogs the tax is the same anywhere in the

United States. So is the floor-stocks tax on any article processed, wholly or in chief value, from hogs.

There is an analogy between geographical uniformity with respect to bankruptcy laws (Constitution, Art. I, Sec. 8, Cl. 4), and such uniformity with respect to excises. As to uniformity "throughout the United States," in connection with bankruptcy laws, see *Leideigh Carriage Co. v. Stenzel,* 95 Fed. 637. An excise is uniform if it applies everywhere in the United States and in the same manner to all who come within its terms. *Patton v. Brady,* 184 U. S. 608, 622. And, as certain decisions under the Bankrutpcy Act attest, a law may be uniform throughout the United States, even though in actual application the law may produce somewhat different results in different parts of the country, in view of differences existing outside of the law itself. *Darling v. Berry,* 13 Fed. 659; *Hanover National Bank v. Moyses,* 186 U. S. 190; *Stellwegen v. Clum,* 245 U. S. 605.

C. These excises do not contravene the Fifth Amendment.

(1) The Fifth Amendment is not a limitation on the Nation's power of taxation. *Brushaber v. Union Pacific Rd. Co.,* 240 U. S. 1, 24, and cases there cited. See also *United States v. Bennett,* 232 U. S. 299, bot. 307, and f. n. vi on 308.

A business may be destroyed by taxation without violation of the clause. *Alaska Fisheries Co. v. Smith,* 255 U. S. 44, 48. See also *McCulloch v. Maryland,* 4 Wheat. 316, 431. How burdensome a tax may be and to whom it is to be a burden, are legislative rather than judicial matters. *Veazie Bank v. Fenno,* 8 Wall, 533, 548. And see *Child Labor Tax Case,* 259 U. S. 20, 40.

Where duties were imposed illegally, under executive order, congressional ratification of the imposition of the duties was held not to contravene the Fifth Amendment—not even if with respect to duties as to which, at the time of

such ratification, persons who had paid them had an action pending to recover them. *United States v. Heinszen,* 206 U. S. 370, 386 *et seq.*

(2) It is to be noted that we are dealing, not with statutes imposing penalties, but with statutes imposing taxes, and when what is imposed is genuinely a tax, it does not contravene the Fifth Amendment, nor does the motive for imposing it matter. *Magnano Co. v. Hamilton,* 292 U. S. 40, 44 *et seq.,* esp. bot. 47; *Tyler v. United States,* 281 U. S. 497, 504; *Regal Drug Corporation v. Wardell,* 260 U. S. 386, bot. 391; *Lipke v. Lederer,* 259 U. S. 557; *Alaska Fisheries Co. v. Smith,* 255 U. S. 44, 48-49; *McCray v. United States,* 195 U. S. 27; *In re Kollock,* 165 U. S. 526, bot. 536.

The statutes involved in the case at bar do not present, as did those involved in the *Child Labor Tax Case,* 259 U. S. 20, 36, 42, a penalty for a departure from a standard of conduct.

D. These excises are not invalid on the ground that they contravene the Tenth Amendment.

They do not "contravene any prohibiting words to be found in the Constitution" (language borrowed from *Missouri v. Holland,* 252 U. S. 416, 434). Cross-reference, I C (1). These excises, being genuine, are not "forbidden by some invisible radiation of the Tenth Amendment" (language borrowed from *Missouri v. Holland, supra*). Cross-reference, I C (2). The Tenth Amendment does not operate "to take away the grant of power to tax conferred by the Constitution upon Congress." *McCray v. United States,* 195 U. S. 27, 61. The implications of the *Child Labor Tax Case,* 259 U. S. 20, are to the effect, and the law is, as shown by cases there discussed, that if what is called an excise is in reality such, and not a penalty upon a departure from a standard of conduct, then no matter how great the excise

or what the act or event on which it falls, and though apart from the imposition of the excise such act or event is a matter of State cognizance only, the excise does not contravene the Tenth Amendment.

E. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

(1) The difficulty in this matter lies more in applying than in laying down principles. *State v. Public Service Commission,* 94 Wash. 274, 279, 162 Pac. 523, 525. Congress may lay down policies and establish standards, "leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." *Panama Refining Co. v. Ryan,* 293 U. S. 388, 421. And see *Schechter v. United States,* 79 L. Ed. 888, 895. Evidently findings may be without notice and without the assistance of a fact-finding body. *The Cargo, etc., v. United States,* 7 Cranch 382; *Marshall Field & Co. v. Clark,* 143 U. S. 649, 693; *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, 409-11.

The context of a section may bear upon whether the section properly delegates authority. *Panama Refining Co. v. Ryan,* 293 U. S. 388, 416; *Federal Radio Commission v. Nelson Bros. Bond & Mort. Co.,* 289 U. S. 266, 285.

After the determination and proclamation mentioned in subsection (a) of Section 9, a processing tax takes effect at a fixed time. Such determination is made only upon the existence of facts warranting it—facts to which the policy declared in section 2 of the Act apply. Subsection (b) of section 9 sets up a standard to be adhered to in fixing the rate of the tax. The subsection contemplates that the rate

shall be predicated upon findings of fact, and subsection (c) of Section 9 states how the findings shall be made.

With respect to the matter of delegation of power, the Agricultural Adjustment Act compares favorably with the Flexible Tariff Act upheld in *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, and with the act upheld in *Federal Radio Commission v. Nelson Bros. Bond & Mort. Co.,* 289 U. S. 266.

Under section 9, adjustments of the tax rate must be for the purpose of effectuating the policy declared in section 2 of the Act, and must be upon findings. It seems fair to infer that discontinuance of a processing tax shall occur upon a finding that such discontinuance is in accord with said policy.

The marketing year of a commodity is an objective fact, to be determined as such.

If there is no improper delegation of power in connection with processing taxes, there is none in connection with floor-stocks taxes, as imposition or discontinuance of the latter automatically concurs with the imposition or discontinuance of the former. Section 16 of the Act.

(2) It does not devolve upon petitioner to show that these taxes are constitutional, but upon respondents to show, if possible, that they are not. 12 C. J., Const. Law, sec. 221; 3d Dec. Dig., Const. Law, sec. 48. The presumption of constitutionality is very strong. *United States v. Gettysburg Electric Ry.,* 160 U. S. 668, 680.

(3) Even if sections 9 and 16 of the Agricultural Adjustment Act have involved an undue delegation of power, the excises imposed by said sections have been legalized and ratified.

See section 21 (b) of the Act as amended.

Said section 21 (b) accords with several precedents.

United States v. Heinszen, 206 U. S. 370; *Graham v. Goodcell,* 282 U. S. 409; *Charlotte Harbor & Northern Ry. v. Welles,* 260 U. S. 8, 11; *Rafferty v. Smith, Bell & Co.,* 257 U. S. 226; *Stockdale v. Atlantic Ins. Co.,* 20 Wall. 323.

If the provisions of the Act with regard to rental and benefit payments and the contracts and arrangements concerning them have involved an undue delegation of power, the things done in these connections have likewise been legalized and ratified.

See section 21 (c) of the Act as amended.

Said section 21 (c), also, accords with precedents. Those mentioned above are in point. See also *Hodges v. Snyder,* 261 U. S. 600, bot. 602; *Tiaco v. Forbes,* 228 U. S. 549.

It is submitted that respondents can not challenge the agricultural features of the Act. *Jeffrey Mfg. Co. v. Bragg,* 235 U. S. 571, 576, and cases there cited; *Frothingham v. Mellon,* 262 U. S. 447, 486 *et seq.*

ARGUMENT

I.

Sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, judged by the purposes of the act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

A.

The supreme object of the Constitution as a whole is the general welfare of the people of the United States.

It would seem that any political act, from the ordination of a constitution down to the enactment of a municipal ordinance, should have as its object the welfare of the community to be affected by it—the general welfare of the nation, the general welfare of a State of the United States, the general welfare of county or township, city or village.

That the general welfare of the people of the United States is the object of the Constitution of the United States is attested by the Constitution itself. The Preamble to the Constitution is as follows: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Promotion of the general welfare is the most general purpose stated in the Preamble. Indeed, the purpose is so general that all other purposes stated in the Preamble can be placed under the one head, promotion of the general welfare. It is easy to see that the Preamble would contain no more than it does, in substance and effect,

if it were simply this: "We the people of the United States, in order to promote the general welfare, do ordain and establish this Constitution for the United States of America."

The inclusion, in the Preamble, of a general welfare clause, indicates that by and under the Constitution the general welfare is to be promoted, not only in the several certain ways (instance establishing justice and insuring domestic tranquility) mentioned in the Preamble, but in other ways as well.

It stands to reason that the general welfare is the primary object of the Constitution, because the general welfare is the primary object of all positive law. It is simply a matter of public policy that we have law at all, and what reason of public policy there could be, for our having law, unless the reason be that the public welfare can be promoted through law, it is impossible to perceive.

Even the socalled "private acts" of legislatures are not without a measure of public importance, not without a relation, however tenuous and remote, to the general welfare. Were it not so, what possible excuse could there be for them, in a country whose government is supposed to proceed, in fact as well as theory, from the people, and to be *for* the people?

The difference between a private act and a public act, in point of service to the general welfare, is one of degree, as is likewise the difference between one public act and another, and if a given public act be specifically denominated an act for the public welfare, such act is so denominated merely because it is more obviously and immediately in the interest of that welfare than are most other public acts.

Even when on its face an act is in aid of an individual only, and is actually denominated a *private* act, it has—in

order to be justified it *must* have—some certain, even though relatively remote, public significance. Where, in point of public significance, is the dividing line between an act for the relief of John Doe and an act for the relief of a great mass of people? Perhaps no one can trace the line with precision. However, it suffices, for practical purposes, that we can sense the difference between the private and the public act. The latter is certainly *more* for the public welfare than is the former. And just as there is a difference of degree between the private and the public act, so there is a difference of degree between one public act and another, in point of the promotion of the public welfare.

In the prevailing opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413, we find the following passage:

> "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox,* 148 Mass. 368. But usually in ordinary affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.,* 13 Allen 95, 104."

That "usually in ordinary affairs the public interest does not warrant much of this kind of interference" can never be gainsaid. In *Pennsylvania Coal Co. v. Mahon,* the court divided over whether considerations of general welfare within a State warranted the statute involved in that case. The majority of the court did not think so; Mr. Justice Brandeis did. He thought the statute necessary to protect the public from detriment and danger—that is to say, to promote the general welfare. In view of the public detriment and danger

involved in the agricultural situation, the Agricultural Adjustment Act is not the outgrowth of "ordinary affairs." It is the outgrowth of affairs warranting some of "this kind of interference" on a national scale. It is not to be numbered among ordinary public acts. It is in such degree in the interest of public welfare that, although all laws are in theory for that welfare, this particular act should be specifically denominated a public-welfare statute. It is not only in theory for the public welfare, but is especially so in fact.

At this point we may advert to the meaning of "general welfare."

The common good is precisely what the common man thinks it is—the good of all.

The terms "general welfare," "public welfare" and "common welfare" are synonymous.

> *Stockton v. Williams* (Mich.), 1 Doug. 546, 570;
> *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752, 754;
> *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, 264;
> *Aymette v. State*, 2 Humph. (21 Tenn.) 154, 158.

General (public, common) welfare embraces every matter which, with respect to any interest, whatever it may be (e. g., any social, political or economic interest), involves the welfare of all who constitute a given community (e. g., a city, a State, the United States). The term "general welfare," with regard to the number and diversity of the matters it may concern, is a term of the broadest import.

> *Standard Oil Co. v. City of Bowling Green*, 244 Ky. 362, 50 S. W. (2d) 960, 961.

> "The public welfare embraces a variety of interests calling for public care and control. These are: 'The primary social interests of safety, order and morals;

economic interests; and non-material and political interests.' Freund, Police Power, secs. 9, 15."

State v. Hutchinson Ice Cream Co., 168 Iowa 1, 10, 147 N. W. 195, 199, L. R. A. 1917 B, 1918.

"As our civic life has developed, so has the definition of 'public welfare,' until it has been held to embrace regulations to promote the economic welfare, public convenience and general prosperity of the community."

Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479;
Pettis v. Alpha Alpha Chapter, 115 Neb. 525, 213 N. W. 835, 838.

Not only is the term of broad import with regard to the number and diversity of the matters it may concern, including economic interest or welfare, but also with regard to the number of individuals and classes it concerns. It connotes the antithesis of the special or private interest of an individual or class.

See *Steele-Smith Dry Goods Co. v. Birmingham Ry. Light & Power Co.,* 15 Ala. App. 271, 73 So. 215, 216.
And see *Platt v. Craig,* 66 Ohio 75, 63 N. E. 594, 595.

"Mr. Webster says that 'in *general, public* expresses something common to mankind at large, to a nation, state, city or town, and is opposed to *private,* which denotes what belongs to an individual, to a family, to a company, or a corporation'."

Chamberlain v. City of Burlington, 19 Iowa 395, 403.

"The Century Dictionary defines it [public] as: 'Of or belonging to the people at large; relating to or affecting the whole people of a state, nation or community; not limited or restricted to any particular class of the community.' The New International defines it as: 'Of

or pertaining to the people; relating to or affecting a nation, state or community at large'."

Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. N. S. 510.

In ultimate, all persons and all interests must be beneficially affected by a law, must be directly or indirectly benefitted by attainment of its object, else the law fails to achieve a public goal. That which is directly for the welfare of many may bring welfare indirectly to all others, so that, in the ultimate, the welfare of all is promoted. Individuals and classes find their greatest *ultimate* welfare in the welfare of all.

"Judge Dillon, in his work on Municipal Corporations, volume 1, p. 212, says * * * 'If one suffers injury, it is either *damnum absque injuria,* or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure'."

Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 481.

And see *Chicago, Burlington & Quincy Ry. Co. v. People,* 200 U. S. 561, 593.

So, even if the recipients of the *direct* benefit of an act be a class, if the object of the act is to benefit, not the class, but the public at large (individuals and classes generally), the object is general welfare. If an act confers a direct benefit upon farmers as a class, or upon a certain class of farmers, not for the sake of the farmers only but for the sake of the public, the act is an act to promote the general welfare. There is a decided difference between legislation which has for its sole object the benefit of a class and legislation which benefits a class with a view to achieving the ultimate benefit of the public—between class benefit as an end in itself and class benefit as a means to a public end.

If agriculture be driven to the wall, the nation is driven to the wall.

(An examination into the meaning of general welfare may be found in an article entitled "The Legal Concept of General Welfare," in The Notre Dame Lawyer, Vol. X, No. 1, p. 42.)

As the economic life of the Nation develops, becoming more and more complex, the number of things that are of material import and concern increases, and hence the number of things with which the several States can not, acting each for itself, deal effectively, also increases. It is submitted that it could hardly have been the real intent of the framers of the Constitution that in those matters which are of vital national import and concern, but in which action by a State is futile, the Nation should be precluded from taking effective action to promote the general national welfare.

The view here expressed is free of dangerous tendencies. It recognizes a line of demarcation between State and Nation. It is in consonance with a representative form of government, and with all the checks and balances incident to the division of government into three branches. It does not connote any unwarranted delegation of power to the executive branch of the government; much less, as under the National Industrial Recovery Act, to groups of private citizens.

It is submitted that on the question whether a statute is for the promotion of the general welfare, the considerations are the same, whether the statute professes to be enacted pursuant to a general constitutional mandate or pursuant to an exercise of the police power, to promote the general welfare. In either case, if specific authorization for the enactment of the statute be not found in the Constitution, there must be a reasonable necessity for attaining the end which

the statute has in view and the method devised to attain the end must be reasonable (see Division C of this part of the brief).

It is submitted that the survival of democratic institutions is less jeopardized by a centralization of control under a representative form of government, in matters involving the welfare of the entire people of the United States, than by the confusion and futility incident to leaving such matters to be dealt with, haphazardly and inefficiently or not at all, as the case may be, by forty-eight States each acting by itself.

B.

These taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution.

(1) If the Constitution contains a general authorization to Congress to lay and collect taxes to provide for the general welfare, the power of Congress to tax to that end lies in the very letter of the Constitution. The Preamble to the Constitution states the general purpose of the document and charts a general course for the government organized under the document. The Preamble states, in effect, that such purpose is and such course should be, to *promote* the general welfare, and in Article I Congress is authorized to raise funds to *provide* for pursuing such course and carrying out the said purpose.

Concerning the general-welfare purpose expressed in the preamble to the Constitution, the following questions are in order: Is that the purpose of any particular part of the Constitution, or is it the purpose of the Constitution as a whole? Is it the purpose of Article I but not of Article II or Article III of the document? Is it the purpose of the

articles but not of the amendments? Or vice versa? Then can it be the purpose of one *clause* but not of another? Or is it the purpose of *every* clause of the instrument? Is it not the purpose of every *word* of the instrument? Of every comma, every semicolon, every dash, every period? Is it not, in short, the purpose of the instrument as a whole and shall not the instrument as a whole be so interpreted as to give effect to that purpose at all times?

See *Holmes v. Jennison*, 14 Pet. 540, bot. 570.
Also *Commonwealth v. City of Newport News* (Va.), 164 S. E. 689, 696 (a constitution must be construed "in the light of the purposes for which it was ordained.").

The Constitution must be read and interpreted with the thought in mind that every scintilla of the instrument is with a view to promoting the general welfare of the people of the United States. There is broad scope, then, in the clause which states that the Congress shall have power to levy and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. There is harmony between the welfare-purpose clause of the Preamble and the general-welfare phrase of the tax clause. The one states a general purpose and furnishes a criterion for the construction of the instrument as a whole; the other imposes a limitation, but upon the taxing power only—that power is not to be exercised *except* to pay debts, provide for the common defense, and *provide for the general welfare.* It is not, for instance, to be exercised to confer upon some individual some exclusively individual benefit, some benefit apart from considerations of common defense or general welfare or the payment, by the Nation, of its debts.

See Burdick, The Law of the American Constitution, sec. 77.

We believe, as Mr. Justice Story believed many years ago that these words "provide for the common defense and general welfare," mean exactly what they say. He said that, "construing this clause in connection with, and as a part of the preceding clause, giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause, and limits the taxing power to objects for the common defense or general welfare. It then contains no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation."

Story, Commentaries on the Constitution, 5th ed., sec. 911.

Mr. Justice Story said, also: "* * * No person has a right to assume, that any part of the Constitution is useless, or without a meaning; and *a fortiori* no person has a right to rob any part of a meaning, natural and appropriate to the language in the connection in which it stands. Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. Why, then, should such a meaning be rejected?"

Story, Commentaries on the Constitution, 5th ed., sec. 912.

He goes on to say: "It is no sufficient answer to say, that the clause ought to be regarded, merely as containing 'general terms, explained and limited, by the subjoined specifications, and therefore requiring no critical attention, or studied precaution;' because it is assuming the very point in controversy, to assert, that the clause is connected with any subsequent specifications. It is not said, to 'provide for the common defense, and general welfare, *in manner following, viz.,*' which would be the natural expression,

to indicate such an intention. But it stands entirely disconnected from every subsequent clause, both in sense and punctuation; and is no more a part of them, than they are of the power to lay taxes. Besides, what suitable application, in such a sense, would there be of the last clause in the enumeration, viz., the clause 'to make all laws, necessary and proper for carrying into execution the foregoing powers, etc.?' Surely, this clause is as applicable to the power to lay taxes, as to any other; and no one would dream of its being a mere specification, under the power to provide for the common defence and general welfare."

Story, Commentaries on the Constitution, 5th ed., sec. 913.

The use for which the Gettysburg battlefield was taken by the United States through the exercise of the power of eminent domain, was spoken of by Mr. Justice Peckham as "one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country." And he said: "No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them may be drawn that the power claimed has been conferred."

United States v. Gettysburg Electric Ry., 160 U. S. 668, 680.

Neither should a narrow view of the character of the purposes involved in the Agricultural Adjustment Act be taken, and there is no less reason, in connection with providing

for the *general welfare* through the exercise of the power of taxation, than in connection with taking property for a *public use* through the exercise of the power of eminent domain, to say that the power to effectuate certain purposes must "be plainly and unmistakably deduced from any of the particularly specified powers," but, in the one matter as in the other, if such particularly specified powers must be looked to at all, such powers in any number "may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

It is submitted that Warren is correct in saying: "This decision taken in connection with the *Debs Case,* showed that the Court was practically prepared to support any action taken by the National Government and reasonably necessary for its self-preservation and welfare."

2 Warren, The Supreme Court in United States History (1926 ed.), p. 706.

It is the belief of the undersigned that when the Court, so far as what constitutes a public use is concerned, predicated its decision upon no particular clause of the Constitution but upon the comprehensive effect of an indefinite number of its clauses, the Court came very close to, if it did not actually arrive at, the point of regarding the promotion of national benefit (the benefit of the nation as a whole) as within a general power of Congress.

(2) "While, however, the so-called National police powers may be restricted under the Commerce Clause, it is to be noted that there seems to be very little restriction on the extent to which the National Government may regulate, under the taxing power, the production, manufacture, sale and transportation of articles within the States. As early as 1869, it was held, in *Veazie Bank v. Fenno,* 8 Wall. 533, that the taxing power might be exercised for the purpose

of destroying or regulating the thing taxed; and in 1904, this doctrine received further affirmation in the decision in *McCray v. United States,* 195 U. S. 27, involving the Oleomargarine Act. The number of subjects, the manufacture and sale of which Congress has regulated in great detail is large and constantly increasing, of which the following statutes are an example—Oleomargarine Acts of 1886 [24 St. 209] and 1902 [32 St. 193]; the Filled Cheese Act of 1896 [29 St. 253]; the Mixed-Flour Act of 1898 [30 St. 467]; the White Phosphorus Match Act of 1912 [37 St. 81]; the Harrison Narcotics Act of 1914 [38 St. 785]; the Cotton Futures Act of 1916 [39 St. 476]."

2 Warren, The Supreme Court in United States History (1926 ed.), p. 738.
See also Burdick, The Law of the American Constitution, sec. 78.

In other words, if Congress may not achieve a certain result under the commerce clause, Congress may nevertheless, pursuant to the rulings of the Court, achieve a similar result by imposing a tax (note that we say tax, not penalty).

See *infra,* II C (2).

Congress may, if it see fit, destroy agriculture or processing or both, by the exercise of the power of taxation, and the motives of Congress, in the destruction of a thing, by the exercise of that power, are not the subject of judicial inquiry.

See *infra,* II C (1) (2).

If the processing tax were so onerous as to destroy the processing of agricultural products, a matter of legislative policy rather than a matter of judicial inquiry would be presented. And if Congress can destroy something by the

exercise of the power of taxation, may not Congress save or improve something by the exercise of the same power? Particularly if Congress has power to lay and collect taxes to provide for the national welfare? Moreover, must Congress act directly upon a thing to destroy it or to save or improve it? May not Congress tax processing to save agriculture? Surely, it has never been the intent of Congress to destroy processing. But suppose such were the intent. Congress would be the judge of what the answer to each of these questions would be: Does the national welfare hinge more upon what happens to the farmers than upon what happens to the processors? Does the interest of the consumer lie in having the benefit of a large volume of agricultural commodities at low prices or in having the benefit of the preservation of the soil of the agricultural areas, and the preservation of a home-owning, farm-owning agricultural population?

(3) If the processing taxes and the floor stocks taxes can not be justified under the tax clause, may the protective tariff be justified under that clause? The protective tariff is not a tariff for revenue only, just to pay the debts of the United States or to provide for its defense. Consequently the objective of the protective tariff must be to provide for the general welfare. If the protective tariff contemplates, and provides for, the general welfare, why do not the processing taxes and the floor stocks taxes equally if not better contemplate, and provide for, that welfare? The protective tariff, like a processing tax or a floor-stocks tax in conjunction with rental and benefit payments, operates through the law of supply and demand. If it is for the general welfare to cut down the foreign supply of certain commodities by means of a tariff, for the avowed purpose of enabling American manufacturers and producers of such commodities to

obtain higher prices for them than could be charged for them in the absence of protection, it may equally or better be for the general welfare to cut down, by means of rental and benefit payments out of funds raised by means of processing taxes and floor-stocks taxes, the supply of certain domestic agricultural products, so that the farmer may receive for them, not less than what it costs him to produce them, but the cost of producing them plus enough to put the prices for which he sells them on a parity with the prices of the things he buys.

If the Constitution as a whole is not a general mandate to Congress to legislate for the promotion of the common good of the national people or if the tax clause of Section 8 of Article I of the Constitution does not confer upon Congress a general power to lay and collect taxes, duties, imposts and excises to provide for the general welfare, the question may be raised concerning protective duties, as well as concerning processing and floor-stocks excises, whether Congress has power to lay them.

If it be urged that the general welfare for which Congress may provide by the exercise of the power of taxation must lie along some line or lines indicated by some particular power or powers more specifically conferred, does the contention that Congress has power to enact protective tariff laws resolve itself into the contention that the *commerce* clause of said section 8 authorizes the passage of such laws? The key word in the commerce clause is *regulate*. The object of a protective tariff is to promote domestic production, protect the prices of domestic commodities, protect capital invested in domestic enterprise and labor engaged therein. This throws us back upon considerations

of general welfare. There is significance in the very word *protective.*

See *Field v. Clark,* 143 U. S. 649, 696.
See also *Child Labor Tax Case,* 259 U. S. 20, bot. of 24.

Ours has been called a constitution "that has known protective tariffs for a hundred years."

Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48.

Yet it can hardly be argued that anything becomes constitutional by mere lapse of time. We could not argue that if the processing taxes and the floor-stocks taxes were to go unchallenged for a century, they would at the end of that period be constitutional, without regard to what if any foundation may be found for them in the Constitution. And it is submitted, and urged, that the foundation for them along with any foundation there may be for protective tariffs, lies primarily in consideration of general welfare, and that protective duties and the processing and floor-stocks excises must alike stand or fall by reference to the same clause or clauses of the Constitution.

Since the decision in *Alaska Fisheries Co. v. Smith,* a case has been decided in which reasons are given for the constitutionality of protective duties.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394.

"* * * It is enough to point out that the second act adopted by the Congress of the United States, July 4, 1789, Ch. 2, 1 Stat. 24, contained the following recital.

" 'Sec. 1. Whereas it is necessary for the support of the government, for the discharge of the debts of the United States, and the encouragement and protection of manufac-

tures, that duties be laid on goods, wares and merchandise imported: Be it enacted, etc.'

"In this first Congress sat many members of the Constitutional Convention of 1787. The Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. *Myers v. United States,* 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history."

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 411-12.

And see suggestion of counsel in *Hill v. Wallace,* 259 U. S. 44, 53: "The protective tariff was then an established system in England and elsewhere, and doubtless the Constitution contemplated that in the laying of imposts Congress might fix the duties with a view to excluding importation rather than raising revenue."

In the Tariff Act of 1897, in that of 1909, and in that of 1922, encouragement of industries is stated as among the purposes of the Act.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 412.

Let us assume that when our Constitution was adopted, the terms "duties" and "imposts," as used therein, must have been intended to include duties or imposts of the protective type. This means, then, that the true foundation for the protective tariff is found in the tax clause, in which the terms "duties" and "imposts" are used, and in which

it is provided that they may be laid and collected to pay the debts of the United States and provide for the common defense and general welfare. In the same clause occurs the word "excises." Excises, too, may be laid and collected to pay the debts of the United States and provide for the common defense and general welfare. It is as if the clause read thus: "To lay and collect taxes, protective and other duties and imposts, and protective and other excises, to pay the debts of the United States and provide for the common defense *and general welfare.*" There is an analogy between a duty or impost and an excise. There is, too, an analogy between an impost laid to provide protection and an excise laid to provide for protection, and if the one is constitutional because it was in the thoughts of the founding fathers, its analogue should be deemed a thing which they would have considered equally constitutional, if it, also, had been in their thoughts.

Protective duties are imposed upon the importation of commodities in order to affect the supply and the prices thereof in the interests of general welfare; processing and floor-stocks excises are also laid in the interests of general welfare, as the revenues raised through these excises are or may be used to finance certain voluntary efforts of farmers which in the aggregate so affect the supply of certain agricultural commodities as to adjust that supply to the effective demand for those commodities and produce proper price levels therefor. Between affecting one supply by duties on imports and affecting the other supply through such voluntary co-operative efforts, financed through excises on processing, there is no fundamental difference of purpose and effect. Whether the tax itself affects the supply, as in the case of the protective tariff, or is used to finance a program whereby the supply is affected, can make no

difference between the fundamental equities of those immediately benefited through protective tariffs, and those directly benefited by rental and benefit payments, or through subserving the general welfare through protection, on the one hand, of those helped through the protective tariff, and protection, on the other hand, of those helped by rental and benefit payments. If such a difference does not exist in fundamentals, can it be that the Constitution has been so drawn and must be so interpreted that Congress can provide for the one thing and not for the other?

(4) Even if the rental and benefit payments provided for by the Agricultural Adjustment Act were unconstitutional, the excises provided for by sections 9 and 16 of the Act would nevertheless be valid.

Certain provisions of the Act indicate that Congress would have imposed these excises apart from the agricultural program for which the Act provides. Nothing in the Act is to the effect that funds raised through these taxes may not ultimately be appropriated to other purposes. The existence of the economic emergency has been recognized in numerous acts and in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398. Processing and floor-stocks taxes go into the general fund of the Treasury, whence they may be appropriated to finance any of the Acts in question. The Agricultural Adjustment Act provides:

> "Section 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.
>
> "(b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions

of this title, be applicable in respect of taxes imposed by this title: * * *

"(c) * * *."

Moreover, the Act provides (see section 14 thereof): "If any provision of this title is declared unconstitutional, * * * the validity of the remainder of this title * * * shall not be affected thereby."

Congress has not permitted the validity of these excises to depend upon whether the agricultural features of the Act are constitutional, nor has Congress foreclosed itself from appropriating to any permissible purposes the revenues which these excises produce. On the one hand the Act does not appropriate revenues to any purpose other than a public one; on the other hand, as every legislative act is clothed with a strong presumption of its constitutionality, it must be presumed that any act appropriating or re-appropriating these revenues will devote them to purposes to which they may be constitutionally applied. Congress may even use these revenues in connection with moral obligations.

Appropriations may be made to discharge purely moral obligations as well as to discharge those obligations which are legal. *United States v. Realty Co.*, 163 U. S. 427, 437 *et seq.*

We contend that the millions of agreements which the farmers have made with the Secretary of Agriculture, respecting reduction in acreage and reduction in production for market, represent legal obligations—the Secretary promises payments and the farmers promise these reductions. Obviously the reliance of millions of farmers upon the validity of these agreements will have created a moral oblgation on the part of the United States, in the event that such agreements are declared unconstitutional.

C.

The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power.

(1) Under the tax clause, the commerce clause and the post-roads clause, a broad national police power exists, as against which State legislation, however strong the desire to uphold it may be, is upheld only when it can be "construed as no interference with the authority of the National Government."

See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 739.

It is submitted that the police power of the Nation extends beyond the confines of the tax clause, the commerce clause and the post-roads clause.

In connection with a discussion of the national police power, the contents of B (3), *supra,* and both II C and II D, *infra,* are in point. We here discuss the power in connection with, primarily, the matter of rental and benefit payments, our contention being that the processing and floor-stocks taxes, so far as laid and collected with rental and benefit payments in mind, are laid and collected in behalf of a welfare for the protection of which the police power of the Nation may be exercised.

It has been said that "the invocation and application of the 'police power' is nothing more than an appeal to the sociological method of interpreting our constitutions and laws."

Drake, The Sociological Interpretation of Law, 16 Michigan Law Review, 599, 614.
And see 2 Warren, The Supreme Court in United States History, (1926 ed.), p. 740.

The object of the police power, like that of the Constitution, is the promotion of general welfare. "* * * When, in the last decade of the nineteenth century, it [the Court] took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power—'public health, safety and morals'—by interpolating the words 'public welfare,' it advanced far toward acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests, and that it must start from the premise that 'individual interests are to be secured by law, because and to the extent that they are social interests.' * * *"

2 Warren, The Supreme Court in United States History (1926 ed.), p. 744.

Possibly the next great step lies in the clear recognition of the fact that the true boundary between the rights of States and the rights of the Nation lies along the line of cleavage between what is and what is not of national import and concern.

As to the Tenth Amendment: "We must consider what this country has become in deciding what that Amendment has reserved."

Missouri v. Holland, 252 U. S. 416, 434.

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

What people? Clearly, the people of the United States. A citizen of the United States has a dual citizenship; in point of citizenship, he has two capacities; in one of these he is a member of the people of a State; in the other, a member of a people undivided by state lines. He is at once the

citizen of a "country," so to speak, whose boundaries are "state lines," and the citizen of an undivided and indivisible country whose only boundaries are national. If "We the people of the United States" are "the people" to whom are reserved some of the powers not delegated by the Constitution, what are the undelegated powers so reserved to us? Do they not include the power to act in a manner which, being appropriate under our frame of government, shall promote our general welfare? That certainly includes the police power of the people, to be used in their behalf, on occasion, by Congress.

The Constitution nowhere clearly defines the powers reserved to the States or the powers reserved to the people of the United States, but it is respectfully submitted that the tenor of the document as a whole is to the effect that matters of federal import or concern are matters of federal cognizance, and that power in these matters, so far as not otherwise touched upon in the Constitution, is reserved to the people of the United States. The Constitution was not the act of the States, but the act of the people of the United States; the act was that of a single people that under the Articles of Confederation existed as the people of the United States before the Constitution was adopted.

Scott v. Sandford, 19 How. 393, 404;
Martin v. Hunter, 1 Wheat 304, 324;
Chisholm v. Georgia, 2 Dall. 419, 470;
Barron v. Baltimore, 7 Pet. 243, 247.

The Tenth Amendment should be read in connection with the Ninth Amendment.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Constitution of the United States, Ninth Amendment.

If "the people" mentioned in the Tenth Amendment is the people of the United States, it would seem that the Ninth Amendment insures certain rights to the national people.

Holmes v. Jennison, 14 Pet. 540, 557.

The police power, a power *reserved* to the people (Tenth Amendment) is among these rights, and in its very nature is one that on occasion the people exercise through the legislative branch of the government.

"As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states."

12 C. J., Const. Law, sec. 412.
And see *Home Building and Loan Assn. v. Blaisdell,* 290 U. S. 398, 444.

See also *Des Moines v. Manhattan Oil Co.,* 193 Iowa 1096, 1103, 184 N. W. 823, 826-7, 23 A. L. R. 1322 (police power spoken of as a "reserve element of sovereignty").

If under the Tenth Amendment the powers reserved to the several States are those inherent governmental powers which constitute the police power, then under the Tenth Amendment the powers reserved to the people of the United States are likewise such inherent governmental powers as constitute the police power. We can not escape the significance of the word "reserved" as used in the Tenth Amendment. To the people of the United States as a whole, as well as to the several States, powers are *reserved.*

See *Kansas v. Colorado,* 206 U. S. 46, 90.

"Under the American constitutional system, the police

power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states * * *"

12 C. J., Const. Law, sec. 417.

Any statement such as the foregoing overlooks the significance of the words "reserved * * * to the people" in the Tenth Amendment, and should be construed to refer to those matters which do not affect the national people as a whole and do not lie beyond the scope of effective action by a State. Is it not important that matters which genuinely involve the general welfare of the Nation should not be at the mercy of any supposed reservation of power in the States? We do not share the fear mentioned in *Kansas v. Colorado,* 206 U. S. 46, 91, concerning supposed general welfare. If Congress passes and the President approves and the Court upholds an Act, supposition as to whether it is in the interest of a general national welfare should, it would seem, be practically eliminated.

"* * * Within the States Congress may exercise no police power as such, and may affect it only by the enactment of statutes within the powers conferred on it by the Constitution of the United States, either expressly or by clear implication. * * *"

12 C. J., Const. Law, sec. 417.

Any such statement as the foregoing means, merely, that there is a line of demarcation, somewhere, between the police power of a State and that of the people of the United States, and that Congress exercises only the latter, never the former, power. But as to the scope of the powers conferred on Congress by the Constitution, "either expressly or by clear implication," to affect a State (*a fortiori* as to power

so conferred to affect *all* the States and the national people, "the people of the United States," in a matter involving the entire citizenry of the Nation), we must consider the police power as impliedly a part of the Constitution, in the sense of a thing which is by necessity impliedly recognized by the Constitution, inasmuch as the police power and the power of making, changing and amending constitutions, written or unwritten, are parts of the sovereign power of the people, and inasmuch as general welfare is the general object of all manifestations of sovereignty.

It would seem that the case in favor of an exercise of national police power is very strong in a matter which is national on so large a scale that State legislation in the matter, unless in *aid* of national legislation, would be practically futile. And the following things should be noted:

The State can not have its own particular protective tariff, even with consent of Congress. Const., Art. I, Sec. 10, Cl. 2. Nor may several States in which lie the sources of supply of a given commodity achieve price parity for it by making arrangements therefor with one another, as no State may enter into any agreement or compact with another State. Const., Art. I, Sec. 10, Cl. 3. Nor can the State dispose of its surplus products to a foreign nation through the medium of a treaty with such nation. Const., Art. I, sec. 10, cl. 3. So far as regulation of the value of money may be involved in the matter of achieving price parity for agricultural commodities, the State is helpless. Const., Art. I, Sec. 10, cl. 1.

It would seem that with regard to the police power of the Nation, the principles operative within the sphere within which the power exists are identical with those operative within the sphere within which the police power of a State exists, and that, therefore, to paraphrase the statement of

a famous author and adopt the statement of a famous judge, "a law purporting to be enacted for the protection of the public will not be declared invalid, unless it shall be made clear to the Court that it was not open to Congress to find that it had a real or substantial relation to the protection of the public health, safety, morals or welfare, or unless it is so clearly arbitrary or oppressive, or (as Judge Holmes has said) 'so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions.' "

See 2 Warren, The Supreme Court in United States History, (1926 ed.), p. 745, which cites:
Muller v. Oregon, 208 U. S. 412;
Broadnax v. Missouri, 219 U. S. 285;
Chicago, etc., R. R. v. McQuire, 219 U. S. 549;
German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

In connection with due process this has been said: "Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the Court say that it was not due process of law. In this way, the principle may be observed that with the expediency of the statute the Court has no concern, but only with the power of the Legislature."

Learned Hand, Due Process of Law and the Eight Hour Day, 21 Harvard Law Rev. 495, 500.

It can hardly be true that it was not open to Congress to find that agricultural rental and benefit payments have a substantial relation to the protection of the general welfare of the Nation. Nor are the contracts or other consensual arrangements involving such payments so clearly arbitrary or oppressive or so unreasonable and far beyond the necessities of the case as to be deemed a purely arbitrary

interference with the business of agriculture. Nor is it obvious beyond peradventure that the Agricultural Adjustment Act is the result of passion or the result of ignorance or folly. On the contrary, it bears the earmarks of deliberation and shows upon its face that it is the offspring of existing conditions requiring legislative action.

(2) The Agricultural Adjustment Act embodies a conservation program. Rental payments in connection with corn-production involve reduction of the acreage planted to corn. See sec. 8(1). Reduction of the corn acreage involves resting the soil from corn-production, compelling, to a certain extent, a soil-conserving rotation of crops. We have all witnessed the waste of our forests and the waste of many other natural resources. What about wasting the soil? It is common knowledge that the same sort of crop, taken from the same soil year after year, takes the same elements from the soil year after year, and in time so far robs the soil of those elements that it will no longer produce that same sort of crop. It is common knowledge, too, that no matter how deep the soil may be, the depth to which a plow will go is limited. If the corn belt is a national asset because it produces corn, we had better keep its soil fit for corn production. If the cotton belt is a national asset because it produces cotton, we had better keep its soil fit for cotton production. Unlimited production in these belts is not only ruinous to farm prices but ruinous to the soil, which is a great national asset. In the interest of soil conservation, a limitation and regulation of the production of certain agricultural commodities is a paramount necessity. Once the corn belt or the cotton belt or any other great area especially suited to the production of some particular crop is destroyed, other things remaining equal, buying power will fall to extremely low levels in that area, and the industrial sections of the United

States will suffer along with the agricultural area in question.

To justify the exercise of the police power in the matter of conservation of the soil, it is not necessary that the Act state either that it is enacted in the exercise of that power or in the interest of soil-conservation. It is enough that the occasion for conserving a natural resource is so obvious that it may be judicially noticed. It is submitted that although emergency legislation of the police-power sort often makes reference to emergency, police-power legislation need not in terms refer to the power that renders it valid.

23 C. J., Evidence, secs. 1810 and 1860.

Clearly, the conservation of a natural resource extending over several states is beyond the pale of State action, and presents a national problem, which only national legislation can solve. What can Iowa, singlehandedly, effectively do to conserve the national asset known as the corn belt, which extends eastward from Iowa into Illinois, westward from Iowa into Nebraska, northward from Iowa into South Dakota, southward from Iowa into Missouri? Iowa may not even enter into a crop-rotation or other compact with these other states, to conserve this entire vast national resource in behalf of the people of the United States.

Constitution, Art. I, Sec. 10, Cl. 3.

The Agricultural Adjustment Act is a program for the co-operative efforts of free men in an undertaking of national import and concern. It is submitted, however, that the object of the undertaking is such, in its bearing on the general welfare of the Nation, that coercive measures, within reasonable limits, in furtherance of that object, by the exercise of the police power, would not be out of order, if

the situation required them. It is an old saying that one man's liberty ends where another man's liberty begins. The point where one man's liberty ends and another man's liberty begins is precisely the point at which considerations of general welfare arise. Nor, inasmuch as such measures, under our American form of government, must run the gamut of legislative enactment, presidential approval and judicial scrutiny, need we fear to employ them in the advancement of the general welfare. Unless they are reasonably necessary, and reasonable in method, they will not run the gamut.

See *American Coal Mining Co. v. Special Coal and Food Commission of Indiana,* 268 Fed. 563, 570; appeal dismissed, 248 U. S. 632.
See *Nebbia v. New York,* 291 U. S. 502, 525.

In *Schechter v. United States,* it is said that the plan of the National Industrial Recovery Act "is not simply one for voluntary effort" but "involves the coercive exercise of the law-making power," binding, if valid, "equally those who assent and those who do not assent."

Schechter v. United States, 79 L. Ed. 888, 894.

But the plan of the Agricultural Adjustment Act *is* simply a plan for voluntary effort—a plan for "a broad and intensive co-operative effort by those engaged" in agriculture (we employ an adaptation of language used in the Schechter case); nor does it subject agriculture to "the coercive exercise of the law-making power" or bind "equally those who assent and those who do not assent." Under the Agricultural Adjustment Act, a person enters into a contract or other consensual arrangement with the government, and voluntarily subjects himself to the rules and regulations pertinent to such contracts or arrangements. It can

be no less true of the rights of the individual than of the powers of a State, that they are not invaded by a statute which "imposes no obligation but simply extends an option," an option the State or the individual, as the case may be, is free to accept or reject.

Massachusetts v. Mellon, 262 U. S. 447, 480.

Nor would it seem that the United States invades the rights of a State by making contracts with those inhabitants of the State who are qualified for and desirous of making such contracts, in a matter vital to the welfare of the Nation.

The arguments we advance warrant the Agricultural Adjustment Act as the embodiment of a long-time program. That the existing economic emergency justifies the Act, under the police power, as a short-time program, for the reasons stated in the Act itself, seems too clear for argument. "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal current of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

See the Declaration of Emergency, at the beginning of said title I.

An emergency is not a source of power, but beyond question is an occasion for the exercise of power.

Schechter v. United States, 79 L. Ed. 888, 894, citg.
Ex parte Milligan, 4 Wall. 2, 120, 121, and
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 426.

That an emergency affecting agriculture exists is likewise beyond question, as the Court may judicially notice.

The Court judicially notices matters of common knowledge.

23 C. J., Evidence, sec. 1810.

The Court judicially notices presidential proclamations and the contents thereof.

23 C. J., Evidence, sec. 1900.

The Court not only judicially notices acts of Congress (including, of course, what those acts state concerning the emergency and concerning agriculture), 23 C. J., Evidence, 1947, but all allusions to those matters in the Congressional Record.

23 C. J., Evidence, sec. 1934, and footnotes, particularly f. n. 95 (a, 4).

It has been *held* that a court may judicially notice the existence of a public emergency.

Block v. Hirsch, 256 U. S. 135, 154.

D.

In connection with the force and effect of the general-welfare purpose stated in the Preamble, and the general-welfare provision of Clause 1 of section 8 of Article I of the Constitution, the last clause of said section should be considered:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The force and effect of the clause just quoted is to enlarge congressional powers.

Several broad, interesting and instructive statements have been made with respect to this clause.

McCulloch v. Maryland, 4 Wheat. 316, 415.
Legal Tender Cases, 12 Wall. 457, 531 *et seq.*
Legal Tender Cases, 110 U. S. 421, 440.

"We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to Congress."

Legal Tender Cases, 12 Wall. 457, 550.

In the light of such remarks, what of the power to lay and collect taxes, duties, imposts and excises to provide for the general welfare of the United States?

Nor need that which is necessary and proper to such welfare be absolutely and indispensably necessary thereto. The words "necessary and proper" cover "all appropriate means which are conducive or adapted to the end to be

accomplished, and which in the judgment of Congress will most advantageously effect it."

Legal Tender Cases, 110 U. S. 421, 440.
And see *McCulloch v. Maryland,* 4 Wheat. 316, 413.

In the latter case we read: "* * * The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adopted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur."

McCulloch v. Maryland, 4 Wheat. 316, 415.
And see *Legal Tender Cases,* 12 Wall. 457, bot. 531 *et seq.*

If from the Preamble, the tax clause and the last clause of said section 8, a power to act in behalf of the general welfare does not exist, to the extent necessary to render the Agricultural Adjustment Act constitutional, we are at a loss to account for the constitutionality of many things that have been held to be, else are habitually regarded as, constitutional.

The undersigned is not among those who believe that this Court is without the sanction of the Constitution in declaring laws unconstitutional. A written Constitution, like any other legal document, has to be interpreted and construed. The interpretation and construction of a legal document is naturally a judicial function. Obviously, the three branches of our government—the executive, the legislative and the judicial—can not each be the final arbiter of questions of constitutionality. If all three branches had power to pass upon the question of the constitutionality of a statute, we would long ago have had, not that justice which the Constitution was adopted to establish or that domestic tranquility which it was adopted to insure, but unbearable inequality and endless disturbance. So the power impliedly vested in this Court, to declare whether a law is constitutional, is in line with the general-welfare object of the Constitution—an object expressed in its Preamble and exhibited by the document as a whole. But the point apropos to this brief is, whether the argument that sustains the power of Congress to pass such an act as the Agricultural Adjustment Act is any the less clear as a power of Congress than the power to declare a law unconstitutional is clear as a power of this Court.

We can construe the Constitution liberally enough to provide for various things which it does not mention. We can, for instance, construe it liberally enough to provide for national banks and federal reserve banks. We could undoubtedly construe the Constitution liberally enough to justify the Louisiana Purchase and other like purchases of territory. May we not construe the Constitution liberally enough to enable us to achieve an equality between agriculture and other industries, and a parity between the prices of agricultural and those of nonagricultural commodities?

II.

Sections 9 and 16 of the Agricultural Adjustment Act, C. 25, 48 Stat. 31, contravene none of the limitations which the Constitution places upon congressional action.

A.

Neither the processing taxes nor the floor-stocks taxes are within the following prohibition of the Constitution:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

Constitution, Article I, sec. 9.

A tax upon processing is not a tax upon ownership or upon a thing owned but a tax upon something occurring (e. g., processing or selling) in connection with the thing, and so is an excise, which is never regarded as a direct tax.

Tyler v. United States, 281 U. S. 497, 502;
Y. M. C. A. v. Davis, 264 U. S. 47;
Edwards v. Slocum, 264 U. S. 61;
Billings v. United States, 232 U. S. 261, 279;
Stanton v. Baltic Mining Co., 240 U. S. 103, 114;
Flint v. Stone Tracy Co., 220 U. S. 107;
Thomas v. United States, 192 U. S. 363;
Knowlton v. Moore, 178 U. S. 41;
Murdock v. Ward, 178 U. S. 139;
Nicol v. Ames, 173 U. S. 509;
Scholey v. Row, 23 Wall. 346;
Hylton v. United States, 3 Dall. 171.

In fact, in a case decided in 1913, the Court might easily have referred to a certain excise as a "processing tax."

See *Stratton's Independence v. Howbert,* 231 U. S. 399, top of 415.

As to the floor-stocks taxes, it is to be noted that subsection 16(a') does not impose them on stocks not held for *sale* or *other* disposition, *other* disposition meaning, of course, as subsection 15(b) indicates, some disposition in the nature of or analogous to a sale. These taxes are with reference to that which is presumably to occur in connection with such stocks, and, under the same section, when and if a processing tax is discontinued on the basic commodity from which given floor stocks have been processed, a rebate is allowed on any tax which under subsection 16(a) may have been paid on such floor stocks. The rebate, necessarily, is upon the basis of so much of such stocks as, at the time of discontinuance of such processing tax, remains *unsold* or otherwise undisposed of. In fact, subsection 16 (a) *in terms* imposes the tax upon "the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied."

In connection with the remarks we have just made, see:

Patton v. Brady, 184 U. S. 608.

As to both the processing and the floor-stocks tax, it is to be noted that a tax the burden of which may be shifted to others by those who pay it is an indirect tax. "Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; * * *"

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 558.
And see Cooley, Taxation (3d ed.) p. 10.
Also 61 C. J., Taxation, sec. 6, f. n. 57.

Finally, as far as the floor-stocks tax is concerned, it is

to be noted that if the processing tax is valid, and is an excise, and the floor-stocks tax is laid to prevent evasion of the processing tax, the floor-stocks tax is also valid, and is an excise. The truth of the statement just made is recognized in principle in several cases.

Tyler v. United States, 281 U. S. 497, 505 (citg. *Taft v. Bowers,* 278 U. S. 470, 482);
District of Columbia v. Brooke, 214 U. S. 138, 150;
Milliken v. United States, 283 U. S. 15, 23, 24-25.

B.

Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States.

In connection with the question whether these excises are uniform, it is to be borne in mind that the Constitution requires, merely, that duties, imposts and excises must be uniform "throughout the United States." That is to say, the Constitution requires geographical uniformity in the imposition of duties, imposts and excises. "The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts and excises laid by Congress is the territorial uniformity required by Art. I, 8. *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 557; *Knowlton v. Moore,* 178 U. S. 41, 98, 106; *Flint v. Stone Tracy Co.,* 220 U. S. 107, 150; *Billings v. United States,* 232 U. S. 261, 282; *Brushaber v. Union Pacific R. R. Co.,* 240 U. S. 1, 24."

LaBelle Iron Works v. United States, 256 U. S. 377, 392.

That the processing tax on any given commodity or the floor-stocks tax on any given article is uniform "through-

out the United States" can hardly be gainsaid. On the processing of a hundred pounds of hogs the tax is the same in California as it is in Maine. The same, too, in California as in Maine, is the floor-stocks tax on any article processed, wholly or in chief value, from hogs.

Congress has power to establish "uniform laws on the subject of bankruptcies throughout the United States."

Constitution, Art. I, Sec. 8, Cl. 4.

In connection with the provision that laws on the subject of bankruptcies must be uniform, as in connection with the provision that duties, imposts and excises must be uniform, the phrase "throughout the United States" connotes a geographical uniformity.

Leideigh Carriage Co. v. Stenzel, 95 Fed. 637.

Therefore the phrase "throughout the United States" does not mean that all persons within the United States shall be embraced within an act that may be passed only subject to a provision that it shall apply uniformly "throughout the United States," but simply that the Act shall apply everywhere in the United States and in the same manner to all who come within its terms.

See *Patton v. Brady,* 184 U. S. 608, 622.

The excise on the processing of cotton applies thus, and the corresponding excise on articles processed, wholly or in chief value, from cotton. The excise on the processing of hogs so applies, and the corresponding excise on articles processed, wholly or in chief value, from hogs.

Geographical uniformity with respect to processing taxes and floor-stocks taxes is less debatable than is geographical uniformity with respect to bankruptcy laws. The operation

or working of these taxes is the same in all parts of the United States. The operation or working of the bankruptcy law is not the same in all the States, yet that law, in terms applicable to them all and taking no distinction, making no discrimination, among them, is not invalid because the application of the law actually works out differently in different States.

Darling v. Berry, 13 Fed. 659.

The Supreme Court has sanctioned the principles here laid down.

Hanover National Bank v. Moyses, 186 U. S. 190;
Stellwegen v. Clum, 245 U. S. 605.

C.

These excises do not contravene the Fifth Amendment.

No person is to be "deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution, Fifth Amendment.

(1) The Fifth Amendment is not a limitation upon the Nation's power of taxation. "So far as the due process clause is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by limitations of the due process clause. *Treat v. White,* 181 U. S. 264; *Patton v. Brady,* 184 U. S. 608; *McCray v. United States,* 195 U. S. 27, 61; *Flint v.*

Stone Tracy Co., supra, 220 U. S. 107; *Billings v. United States*, 232 U. S. 261, 282."

Brushaber v. Union Pacific Rd. Co., 240 U. S. 1, 24. See also *United States v. Bennett*, 232 U. S. 299, bot. 307, and f. n. vi on 308.

A business may be destroyed by taxation without violation of the clause. "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. *McCray v. United States*, 195 U. S. 27. See *Quong Wing v. Kirkendall*, 223 U. S. 59; *Mugler v. Kansas*, 123 U. S. 623; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482."

Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48. And see:
McCulloch v. Maryland, 4 Wheat. 316, 431.

It has been said that "* * * the judicial cannot prescribe to the legislative departments of the government the limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the Courts, but to the people by whom its members are elected. So if a particular tax bears mainly upon a corporation or a class of corporations, it cannot, for that reason, be pronounced contrary to the Constitution."

Veazie Bank v. Fenno, 8 Wall. 533, 548.
And see *Child Labor Tax Case*, 259 U. S. 20, 40.

The Court has held that where duties were imposed illegally, under executive order, and imposition of those duties was afterward ratified by an Act of Congress, the act did not violate the due process clause of the Fifth Amendment—

not even with respect to duties as to which, when the act took effect, persons who had paid them had an action pending to recover them.

United States v. Heinszen, 206 U. S. 370, 386, *et seq.*

(2) In connection with the matter of due process under the Fifth Amendment, it is to be borne in mind that the processing and floor-stocks taxes are not taxes in name only, but taxes in reality, of the sort known as excises. They are obviously not penalties under the guise of taxes, hence do not constitute in effect a confiscation under that guise, but are bona fide exertions of the power to tax, designed to raise revenues for national purposes. And, the tax being genuine, the motive for imposing it is immaterial.

Magnano Co. v. Hamilton, 292 U. S. 40 *et seq,* esp. bot. 47;
Tyler v. United States, 281 U. S. 497, 504;
Regal Drug Corporation v. Wardell, 260 U. S. 386, bot. 391.
Lipke v. Lederer, 259 U. S. 557.
Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48-49;
McCray v. United States, 195 U. S. 27;
In re Kollock, 165 U. S. 526, bot. 536.

A difference between, on the one hand, an excise, however great, on the processing of a commodity or upon the sale or other disposition of an article, and, on the other hand, what is obviously a heavy penalty upon a departure from a detailed standard of conduct, is to be noted.

Child Labor Tax Case, 259 U. S. 20, 36, 42.

Sections 9 and 16 of the Agricultural Adjustment Act do not attempt to enforce a standard of conduct with respect to the processing of any commodity or with respect to the sale or other disposition of any article.

D.

These excises are not invalid on the ground that they contravene the Tenth Amendment.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution, 10th Amend.

We may say of either the processing tax or the floor-stocks tax (or of the whole Agricultural Adjustment Act, for that matter), as was said of a certain treaty, that it "does not contravene any prohibiting words to be found in the Constitution."

Missouri v. Holland, 252 U. S. 416, 434.

See discussion of the Tenth Amendment, *supra,* I C (1).

If these are genuine excises, they are not (we again adopt the language of *Missouri v. Holland,* 252 U. S. 416, 434) "forbidden by some invisible radiation from the general terms of the Tenth Amendment." The provisions of sections 9 and 16 of the Agricultural Adjustment Act involve genuine excises.

See *supra,* II C (2).

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify in so far as they are applicable, all the provisions of the Constitution, nothing in these amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress."

McCray v. United States, 195 U. S. 27, 61.

The implications of the *Child Labor Tax Case,* 259 U. S. 20, are to the effect, and the law is, as shown by the cases

there discussed, that if what is called an excise is in reality such, and not a penalty for a departure from a standard of conduct, then no matter how great the excise or what the act or event on which it is laid, and though apart from the imposition of the excise such act or event is a matter of State cognizance only, the excise does not contravene the Tenth Amendment.

E.

Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

(1) The difficulty involved in the matter of delegation of power is in applying rather than in laying down the principles by which to determine whether a delegation of power is constitutional.

State v. Public Service Commission, 94 Wash. 274, 279, 162 Pac. 523, 525.

The principles in this matter have only recently been laid down by this Court:

"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

Panama Refining Co. v. Ryan, 293 U. S. 388, 421.
And see *Schechter v. United States,* 79 L. ed. 888, 895.

It does not seem that *findings* must necessarily be upon notice or with the assistance of a fact-finding body.

The Cargo, etc. v. United States, 7 Cranch 382;
Marshall Field & Co. v. Clark, 143 U. S. 649, 693;
J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 409-411.

The context of sections 9 and 16 of the Act may be examined in order to ascertain whether they attempt to delegate legislative authority.

Panama Refining Co. v. Ryan, 293 U. S. 388, 416;
Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U. S. 266, 285.

Section 9 (a) provides: "When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation." Thus he is to make a determination and a proclamation, and after they are made the date on which the tax shall take effect is fixed. The contingency on which a tax shall ensue is not, however, the whim or caprice of the Secretary. The tax upon the processing of a given commodity, except sugar beets and sugar cane, is predicated upon a determination that rental or benefit payments with respect to such commodity are to be made, and this determination, obviously, is to be only upon the existence of such facts, with respect to that commodity, as shall carry out the policy of price parity declared in section 2 of the Act. In the very nature of things, the existence of an occasion to make the determination involves the necessity of a finding of facts warranting the determination—

a finding as to current average farm price of the commodity, and a finding of the purchasing power thereof during the base period.

As to the rate of the processing tax, a standard is set up in section 9 of the Act. Subsection (a) of the section states: "The rate of the tax shall conform to the requirements of subsection (b)." Subsection (b) states: "The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *" Here is a standard, and one that can be adhered to only upon findings of fact. Indeed, subsection (b) proceeds to state an exception in which the ascertainment of facts is mentioned—"except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties." It is submitted that the above quoted main clause of subsection (b), no less than the above quoted exception, contemplates action predicated upon a finding of facts.

"For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Sec. 9(c) of the Act.

The ascertainment of current average farm price and fair exchange value, by reference to statistics, is a finding of facts. To say otherwise is to say that business men throughout the United States do not act upon factual findings in predicating their determinations and decisions, in various matters, upon available government statistics of various types and in widely varying fields.

Is it more difficult, under the Agricultural Adjustment Act, to ascertain the difference between the current average farm price and the fair exchange value of a basic agricultural commodity, than it is to ascertain, under the Flexible Tariff Act, the difference between the cost of producing an article in the United States and the cost of producing it in a foreign country? The Flexible Tariff Act was upheld.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394.

The delegation of certain broad powers, the same to be exercised "from time to time, as public convenience, interest or necessity requires," was also upheld.

Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U. S. 266, 279, 285.

Section 9 declares: "Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary *finds* necessary (all italics in this sentence are supplied) effectuate *the declared policy*, be adjusted by him to conform to such requirements." No less when the tax is initially effective than at intervals thereafter, it is submitted, is it contemplated or allowed that the Secretary shall act except according to what he *finds* necessary to effectuate the policy declared.

Section 9(a) further declares: "The processing tax shall

terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *."

It seems fairly to be inferred from the policy of the Act that the discontinuance of the tax at the end of a marketing year is no more to follow from whim or caprice than is the taking effect of the tax at the beginning of a marketing year. Certainly, the marketing year itself, differing as to different commodities, is not a thing which the Secretary invents, but is in the nature of an objective reality.

Under Secion 16 of the Act, the imposition of a floor-stocks tax upon an article follows automatically upon the taking effect of a processing tax with respect to the commodity from which the article is processed, and refund or abatement of such floor-stocks tax follows automatically upon the discontinuance of such processing tax. Therefore, so far as the delegation of power under section 16 is concerned, the validity of the delegation depends upon whether the ninth section of the Act is valid.

(2) In connection with the constitutionality of said sections 9 and 12, as well as in connection with any other part of the Act, the presumption of constitutionality is ever to be kept in mind.

Numerous cases attest the general proposition that any legislative act whatsoever is clothed with a strong presumption of its constitutionality.

It does not devolve upon petitioner to show that these excises are constitutional, but upon respondents to show, if possible, that they are not.

12 C. J., Constitutional Law, sec. 221;
Third Dec. Dig., Constitutional Law, sec. 48.

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionalty. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the foundation of the government."

United States v. Gettysburg Electric Ry., 160 U. S. 668, 680.

(3) Even if sections 9 and 16 of the Agricultural Adjustment Act have involved an undue delegation of power, the excises sought to be imposed by said sections have been legalized and ratified.

Section 21 *(b)* of the Agricultural Adjustment Act, added to the Act by section 30 Public, No. 320, 74th Congress, and approved August 24, 1935, provides:

> "The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or

made prior to the date of the adoption of this amendment."

It has been held that where certain duties were illegally imposed under executive order, the imposition of the duties could become the subject of ratification by congressional act, and so as to affect such duties involved in a suit pending at the time of the ratification.

United States v. Heinszen, 206 U. S. 370. And see:
Graham v. Goodcell, 282 U. S. 409 (decision affected suit pending to recover illegally collected taxes);
Charlotte Harbor & Northern Ry. Co. v. Welles, 260 U. S. 8, 11;
Rafferty v. Smith, Bell & Co., 257 U. S. 226 (decision affected judgments already obtained for amount of taxes illegally collected);
Stockdale v. Atlantic Ins. Co., 20 Wall. 323.

If there is any difference between congressional validation of illegal executive action where such action is solely upon the initiative of the executive branch of the government, as in the Heinszen Case, and congressional validation of illegal executive action where such action is undertaken at the instance of Congress itself, it would seem that illegal action having its causation in a congressional act has the better claim to congressional ratification.

Congressional ratification of illegal executive action is not confined to the matter of taxes. As to the making of contracts and other consensual arrangements involving rental and benefit payments, Congress, if it could have *authorized* what the Secretary of Agriculture has done with respect to these matters, may *ratify* whatever he has done with respect to them.

See *Hodges v. Snyder,* 261 U. S. 600, bot. 602 (statute affected judgment already entered); and
Tiaco v. Forbes, 288 U. S. 549 (statute affected suit pending).

Section 21 (c) of the amended Agricultural Adjustment Act, added to the Act by section 30 of Public, No. 320, 74th Congress, and approved August 24, 1935, provides:

> "(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 9 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress."

We are not to be understood to imply that the Secretary of Agriculture has acted illegally in any respect. No necessity for amendment of the Act by the addition thereto of the provisions of section 21 is admitted. It is submitted, however, that at no time has the Act been subject to challenge by the respondents with respect to the matters mentioned in section 21 (c). The Act imposes taxes in the interests of general welfare. If one who pays a processing or floor-stocks tax may challenge the Act at all, he may challenge only its tax features, and not the program by which the general welfare is to be furthered under the Act. If the strictly agricultural features of the Act or the methods pursued and the regulations adopted by the Secre-

tary of Agriculture, in connection with those features, may be challenged on the ground that they involve an illegal exercise of power, they may be challenged by those, and only those, if any there are, who can show themselves adversely affected through the application of that power to *them,* in connection with those features of the Act.

> "* * * it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway v. King,* 217 U. S. 524, 534; *Engel v. O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright,* 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal v. New York,* 226 U. S. 260, 271; *Darnoll v. Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry. v. Cado,* 233 U. S. 642, 648."
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> *Jeffrey Mfg. Co. v. Bragg,* 235 U. S. 571, 576.

If the Agricultural Adjustment Act appropriated funds to the agricultural program without specifying the sources of the funds, and a separate act laid these excises without mention of the program, a taxpayer, coming within the scope of the latter act could not challenge the Agricultural Adjustment Act.

See *Frothingham v. Mellon,* 262 U. S. 447, 486 *et seq.*

Can it be that such taxpayer may challenge the program merely because the program is provided for and the excises are imposed in one and the same act?

The separability provisions of section 14 of the Act help conduce to a negative answer to the question.

CONCLUSION

It is submitted, in conclusion, that if the constitutionality of processing and floor-stocks excises is to be judged by the purposes and effects of the Act as a whole, these excises are valid, because the Act as a whole subserves the general welfare which the Constitution as a whole contemplates, subserves the general welfare as contemplated in the tax clause of the eighth section of the first Article of the Constitution, subserves the general welfare which it is the object of the police power of the Nation to protect.

It is submitted, further, in conclusion, that the Act does not contravene, in its tax provisions or in any of its other provisions, any limitation which the Constitution imposes upon the exercise of congressional power. The taxes under consideration are of the sort known as excises, and are uniform throughout the United States. Being genuine (not laid for the purpose of penalizing any person or persons), they trench on neither the Fifth nor the Tenth Amendment. The Act involves no undue delegation of power to the executive branch of the government. However, if the Secretary of Agriculture has exercised power not originally duly delegated to him by the Act, his exercise of such power has been duly validated by Congress. Moreover, if the purposes of the Act as a whole are embraced within considerations of general welfare, the Act accomplishes the end ("to provide for * * * the general welfare") for which the power of Congress to lay and collect taxes may be exercised, and the *method* of furthering the general welfare through the contracts and other consensual arrangements authorized by the

Act is not subject to challenge by any one whose status is simply that of a taxpayer. Respectfully submitted,

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